Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

BRUCE COMLY FRENCH, Trustee for the Estate of Tony L. and Susanne M. Bemis, Petitioner,

v.

CRAIG FOUST, Respondent.

On Petition for a Writ of Certiorari to the Court of Common Pleas of Allen County, Ohio

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PETITION FOR A WRIT OF CERTIORARI

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September 15, 2007

QUESTIONS PRESENTED

Whether the Court of Common Pleas, the highest state court with authority to issue an opinion in this matter which, in fact, did issue an opinion in this matter, erred by concluding that state court personal injury counsel could be paid under a theory of *quantum meruit* when another attorney was appointed properly by the Bankruptcy Court under Section 327 of the Bankruptcy Code to pursue the Estate's interest in the personal injury claim.

LIST OF PARTIES

The debtors, Tony L. and Susanne M. Bemis, through the Trustee in Bankruptcy, Bruce Comly French, constitute the plaintiffs below. The defendant is the tortfeasor, Craig Foust. Two other parties in interest include the debtors' retained personal injury attorneys, Ted E. Cornwell and Christi L. Brown.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

PETITION F[illegible] A WRIT OF CERTIORARI

Petitioner, Bruce Comly French, Trustee for the Estate of Tony L. and Susanne M. Bemis, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Common Pleas of Allen County, Ohio, entered on December 19, 2006, certified for interlocutory review on January 4, 2007, to the Court of Appeals for Allen County, Ohio (Third Appellate District of Ohio), who declined review on February 12, 2007, and then presented to the Supreme Court of Ohio on March 19, 2007, by a Petition to Certify the Record, who declined review on June 20, 2007. This petition is timely and properly filed in that the plaintiff, a federal bankruptcy trustee, has exhausted state court consideration of his federal question.

OPINIONS BELOW

The Judgment Entry of the Court of Common Pleas of Allen County, Ohio, is reprinted in the appendices herein, p. 1a, *infra.*

The Judgment Entry – Civ. R. 54(B) of the Court of Common Pleas of Allen County, Ohio, is reprinted in the appendices herein, p. 6a, *infra.*

The Journal Entry of the Court of Appeals of the Third Appellate Judicial District of Ohio is reprinted in the appendices herein, p. 7a, *infra.*

The Entry of The Supreme Court of Ohio is reprinted in the appendices herein, p. 10a, *infra.*

The order of the United States Bankruptcy Court for the Northern District of Ohio, abstaining from hearing this case. is reprinted in the appendices herein, p. 11a, *infra*.

JURISDICTION

On April 4, 2005, the federal bankruptcy trustee's predecessors-in-interest, the debtors Tony L. and Susanne M. Bemis filed in the Court of Common Pleas of Allen County, Ohio, a personal injury complaint against a third party tortfeasor, Craig Foust. Upon the Bemis's filing a voluntary petition in bankruptcy under Chapter 7 of the Bankruptcy Code on October 15, 2005, this claim became an asset of the Bankruptcy Estate. The voluntary petition in bankruptcy did not disclose the existence of the personal injury claim.

On January 4, 2006, the federal bankruptcy trustee, Bruce Comly French, filed his pleading in the state court below, identifying himself as the real party in interest and, thereafter, entered the appearance of his Bankruptcy Court – appointed counsel.

The Trustee's efforts to remove this action to consider the issue of payment to non-Bankruptcy Court appointed personal injury counsel to the United States Bankruptcy Court for the Northern District of Ohio were rebuffed by that Court. On November 29, 2006, the Trustee, now back in state court, sought from the common pleas court its Order with regard to the same question. The state court opined that state court counsel could be paid under a theory of *quantum meruit*; it further certified that Order for interlocutory appeal under Civil Rule 54 (substantially equivalent to Federal Rule of Civil Procedure 54) to the state court of appeals, given that the potential overlapping payments to counsel might well preclude a successful pursuit of the claim on behalf of the

Estate.

The state court of appeals declined interlocutory review on February 12, 2007; the Supreme Court of Ohio declined to grant the Trustee's Petition to Certify the Record on June 20, 2007. Thus, the Judgment and Order of the Court of Common Pleas of Allen County, Ohio, reflects the opinion of the highest Ohio state court having the authority to render an opinion on the Trustee's claim and which did offer an opinion. An appeal is proper under 28 U.S. Code Section 1257(a).

STATUTORY PROVISIONS INVOLVED

11 U.S. Code Section 327 provides, *inter alia*:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

*****

11 U.S. Code Section 330 provides, *inter alia*:

(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual,

necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

*****

STATEMENT OF THE CASE

On February 11, 2005, Susanne M. Bemis was involved in Allen County, Ohio, in an automobile wreck with Craig S. Foust. Bemis retained counsel, Christi L. Brown and Ted E. Cornwell, Attorneys at Law, to pursue a personal injury claim against Foust. On April 4, 2006, a complaint regarding the personal injury claim was filed in the Court of Common Pleas of Allen County, Ohio.

On October 15, 2005, the Bemises filed a petition for voluntary Bankruptcy under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio. The petition did not disclose the personal injury case despite attorney Brown serving as counsel to the Bemises for both matters. The United States Trustee for Region IX, U.S. Department of Justice, appointed Bruce Comly French as Trustee. The Trustee obtained from the Bankruptcy Court an order barring the Bemises from later claiming an exemption in any proceeds from the personal injury case.

On January 4, 2006, the Trustee filed a notice of change of a real party in interest with the Court of Common Pleas. The trustee, with approval of the Bankruptcy Court, appointed new counsel to pursue on behalf of the Estate the personal injury claim. All parties were given notice of the choice not to retain Brown and Cornwell.

On June 2, 2006, the Trustee sought to have the personal injury claim removed from the trial Court to the Bankruptcy Court. The Bankruptcy Court abstained from ordering the transfer and remanded it to the Trial Court.

On November 29, 2006, the Trustee moved the trial court to rule on the efficacy of prior counsel's potential claims for fees and expenses under the fee agreement between the Bemises and Attorneys Brown and Cornwell. The trustee sought an order that the fee agreement was of no effect so he could pursue the claim without the possibility of paying two sets of attorney's fees.

On December 19, 2006, the trial court denied the Trustee's motion and found that Brown and Cornwell would have a claim to fees and expenses under the theory of *quantum meruit*. On January 4, 2007, the Trustee's motion to certify the issue of attorney's fees as an interlocutory appealable order was granted.

The Trustee then appealed to the Third District Court of Appeals to determine the appropriate law regarding the award of potential attorney fees. On February 12, 2007, the Court of Appeals declined to consider the interlocutory appeal. The Trustee then sought review by the Supreme Court of Ohio, who declined jurisdiction, concluding that the case did not involve a substantial constitutional question.

The Trustee now seeks discretionary review by the Supreme Court of the United States, seeking a reversal of the order of the trial court and its judgment holding that the attorney fees for personal injury claims are considered unsecured debts determined on a *quantum meruit* basis in the subsequently-filed bankruptcy proceedings and are to be disbursed as claims from the corpus of the recovery for the personal injury claim.

THE WRIT OF CERTIORARI SHOULD BE ISSUED TO PROPERLY INTERPRET THE BANKRUPTCY CODE

A. Overview of the Argument

The Trustee submits that all counsel working for the benefit of the Bankruptcy Estate must be appointed, and thereafter paid, in strict compliance with the provisions of Sections 327 and 330 of the Bankruptcy Code. This ensures that only approved counsel are paid; rather than paying multiple counsel under different compensation schemes as authorized by the state court of common pleas. Review of that state court decision by the Supreme Court will result in a uniform national rule, as contemplated by the Bankruptcy Code, and avoid the inconsistencies occasioned by resort to different state laws.

The Trustee specifically requests that judgment below be reversed and that this case be remanded with instructions to the trial court that the two counsel not appointed by the Bankruptcy Court are entitled to no payments.

B. The Bankruptcy Code provides the exclusive means by which an attorney representing the bankruptcy estate may be compensated for fees and expenses.

Retention of counsel to represent a bankruptcy estate in legal proceedings is provided for in the Bankruptcy Code. Section 327 authorizes the trustee, with the court's approval, to employ attorneys, "to represent or assist the trustee in carrying out the trustee's duties under" the Bankruptcy Code. 11 U.S.C. § 327(a). Section 330 allows for the compensation

of professional persons employed under section 327 with the bankruptcy court's approval. 11 U.S.C. § 330.

Appointment by the trustee with the approval of the bankruptcy court pursuant to section 327 "is a prerequisite for the allowance and payment of any professional fees pursuant to section 330." *In re Cooper*, 263 B.R at 837; *In re Foster*, 247 B.R. 731, 733 (Bankr. S.D. Ohio 2000); *Michel v. Federated Dep't Stores (In re Federated Dep't Stores)*, 44 F.3d 1310, 1320 (6th Cir. 1995) ([A] valid appointment under § 327(a) is a condition precedent to the decision to grant or deny compensation under § 330(a)....")

This Court has made clear: "If [an] attorney is to be paid from estate funds under §330(a)(1) in a chapter 7 case, he must be employed by the trustee and approved by the court." *Lamie v. United States Trustee*, 540 U.S. 526, 538-539 (2004).

Brown and Cornwell did not receive appointment to prosecute the personal injury claim on behalf of the estate and, therefore, are not entitled to any compensation.

C. The Supremacy Clause of the United States Constitution requires that an Ohio court compensating for fees and expenses of an attorney who represents a bankruptcy estate award fees only in accordance with the Bankruptcy Code and not under an Ohio equitable scheme of *quantum meruit.*

A state lacks the ability to supplant its law for that of the Bankruptcy Code in the area of compensation to be paid by attorneys. "Where Congress has prescribed the rule to govern the compensation of those employed by the bankruptcy court, those claims are not less dependent on the federal rule because they are asserted as an incident to another suit." *Brown v. Gerdes*, 321 U.S. 178 (1944); *See*

also, Gross v. Irving Trust Co., 289 U.S. 342, 345 (1933) ("The jurisdiction of the bankruptcy court being paramount, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the supervening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court.")

The Bankruptcy estate must be controlled by one authority and not be subjected to conflicting orders in order to fulfill the purpose of administering the assets of the debtor in such a manner that creditors can be paid as much as possible.

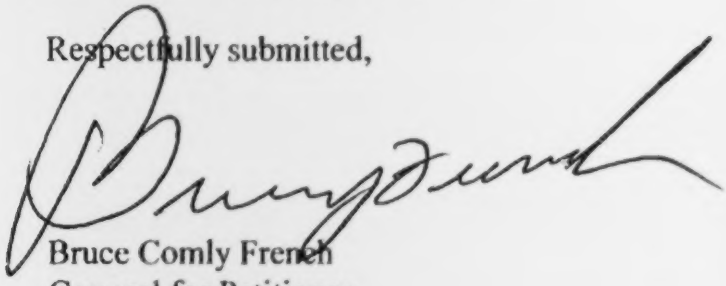
D. Conclusion.

The issues fairly presented by this case call out for this Court's consideration so that the preemptive federal bankruptcy policy of maximizing the assets payable to all creditors may be vindicated. Any attorney representing the estate must first be appointed by the Bankruptcy Court, and failure to do so results in release of all claims of attorney's fees from the bankruptcy estate.

CONCLUSION

For the foregoing reasons, the petitioner requests that a writ of certiorari issue to the Court of Common Pleas of Allen County, Ohio, to provide the relief sought by the petitioner.

Respectfully submitted,



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IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

Susanne M. Bemis, et al.,	*	
	*	CASE NO.: CV 2005 0325
Plaintiff(s)	*	
-v-	*	JUDGMENT ENTRY
CRAIG FOUST, et al.,	*	
Defendant(s)	*	

* * * * * * * * * * * * * * * * * * *

This matter comes on for consideration of the bankruptcy trustee's motion for a ruling on the efficacy of prior counsel's potential claims for fees under a fee agreement, filed on November 29, 2006. No response was filed.

Apparently, before the plaintiffs in this case filed for bankruptcy, attorney Ted Cornwell represented them in a personal injury case. Cornwell had a contingent fee agreement with plaintiffs. Plaintiffs must have filed for bankruptcy and Bruce Comly French was appointed trustee. The Bankruptcy Court apparently appointed Diane French as counsel for the trustee and plaintiffs. The Bankruptcy Court abstained from handling the underlying personal injury case because the personal injury case had "significantly progressed." (See Bankruptcy Court Entry, dated July 20, 2006 and attached to the Trustees notice filed in this case on September 1, 2006)

Now, the trustee wants this Court to rule on the efficacy of Cornwell's potential claim for a fee pursuant to his agreement with plaintiffs. The Court can only assume that Cornwell has made a claim for a fee. There is nothing in the record to prove that. The trustee attached a letter from Cornwell and a copy of the fee agreement to the instant motion, but there is no showing that Cornwell claims a fee. There is also no indication in the record that the underlying personal injury case, for which Cornwell originally represented the plaintiffs, has been settled or otherwise reduced to a judgment.

Ohio recognizes two types of attorney liens: (1) general, or retaining liens, and (2) special, or charging liens. *Fire Protection Resources, Inc. v. Johnson Fire Protection Co.* (1991), 72 Ohio App.3d 205, 209, 594 N.E.2d 146, 148-149, citing *Foor v. Huntington Natl. Bank* (1986), 27 Ohio App.3d 76, 27 OBR 95, 499 N.E.2d 1297. A retaining lien attaches to all property, papers, documents, and monies of the client which come into the attorney's possession during the course of his representation. *Foor, supra*, at 79, 27 OBR at 98-99, 499 N.E.2d at 1301-1302. A retaining lien is a "passive lien," as an attorney cannot actively enforce it; instead the attorney must wait until the client, out of embarrassment or inconvenience, agrees to pay his attorney any fees which are owed in exchange for the return of property. Id.

An attorney may also have a special or charging lien upon a judgment, decree, or award obtained for a client. See *Mancino v. Lakewood* (1987), 36 Ohio App.3d 219, 223-224, 523 N.E.2d 332, 336-338. Courts differ in deciding whether the lien may attach only to a monetary judgment or to settlement proceeds as well. See *Cohn v. Goldberger* (1923), 109 Ohio St. 22, 141 N.E. 656 (refers to an attorney's right

"to payment of fees earned in the prosecution of litigation to judgment"); *In re Hronek* (C.A.6, 1977), 563 F.2d 296 (in Ohio there is no statutory or common-law rule which gives an attorney a lien on his client's cause of action). But, see, *Mancino, supra* (lawyer entitled to bring action to enforce lien on settlement proceeds).

This Court determines that Cornwell has a charging lien at least to the extent of fees earned for services rendered in the personal injury case that had "significantly progressed" before the bankruptcy was filed, on a *quantum meruit* basis.

The crucial fact here is that Cornwell, who originally represented plaintiffs in this case, was not appointed to represent the plaintiffs by the Bankruptcy Court. French was appointed. If effect, Cornwell was discharged; not directly by the original clients with whom he had a fee agreement. Cornwell was discharged by the trustee who was substituted as the real party in interest, instead of plaintiffs.

As the Ohio Supreme Court pointed out in *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 629 N.E.2d 431, a client has an absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney for services rendered prior to the discharge. However, when an attorney representing a client pursuant to a contingent-fee agreement is discharged, the attorney's cause of action for a fee recovery on the basis of *quantum meruit* arises upon the successful occurrence of the contingency. In determining the reasonable value of those services in *quantum meruit*, the trial court should consider the totality of the circumstances involved in the situation, including the number of hours worked by the attorney before the discharge, the recovery sought, the skill demanded, the

results obtained, and the attorney-client agreement itself. *Id.* at syllabus.

The trustee states in his motion that the U.S. Court of Appeals for the Sixth Circuit has held that counsel not appointed by the Bankruptcy Court may not be paid on a *quantum meruit* theory. Unfortunately, the trustee does not cite a case, and this Court cannot find an Ohio or Sixth Circuit case that stands for that proposition.

"The equitable doctrine of quantum meruit is based on an implied 'promise on the part of the defendant to pay the plaintiff as much as he reasonably *deserved* to have for his labor.'" *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 68 Ohio St.3d 570, 629 N.E.2d 431, 434 n.1 (1994) (citation omitted). The Court finds Cornwell is entitled to as much as he reasonably deserves to have for his labor in significantly progressing the underlying personal injury case to the point that the Bankruptcy Court decided to abstain from exercising jurisdiction.

In Ohio, the essential elements of recovery under *quantum meruit* are:

"(1) Valuable services were rendered or materials furnished, (2) for the person sought to be charged, (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him, (4) under such circumstances as reasonably notified the person sought to be charged that plaintiff, in performing such services was expecting to be paid by the person sought to be charged."

Sonkin & Melena Co., L.P.A. v. Zaransky, 83 Ohio App.3d 169, 614 N.E.2d 807, 811-12 (1992) (citation omitted).

In *Butzel v. Webster Apartments Co.* (C.A.6 1940), 112 F.2d 362, a federal bankruptcy reorganization case, attorneys had not finally completed the services in the state court for which they were to be paid when the federal case was started. The court applied the rule that the measure of recovery of fees was based on the principle of *quantum meruit* and the attorneys must be paid for the services rendered and the question is how much must be paid and on what basis.

Assuming the successful occurrence of the contingency upon which Cornwell's fee agreement was based; assuming valuable services were rendered by Cornwell[1] for the plaintiffs; assuming the services were accepted, used or enjoyed by the plaintiffs, and assuming such circumstances as reasonably notified the plaintiffs that Cornwell, in performing such services was expecting to be paid[2] and considering the totality of the circumstances involved in the situation, this Court finds that Cornwell is entitled to a fee for services rendered on the principle of *quantum meruit.*

IT IS SO ORDERED.

December 19, 2006

/s/Jeffrey L. Reed
Jeffrey L Reed, Judge

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[1] The Bankruptcy Court determined that the personal injury case had "significantly progressed."

[2] There was a fee agreement from which it can be found plaintiffs were reasonably notified that Cornwell expected to be paid.

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

BRUCE COMLY FRENCH, etc.,	*	
	*	CASE NO.: CV 2005 0325
Plaintiff(s)	*	
-v-		
	*	JUDGMENT ENTRY
CRAIG FOUST, et al.,		Civ. R. 54(B)
	*	
Defendant(s)	*	

* * * * * * * * * * * * * * * * * * *

This matter comes on for consideration of the motion filed by the plaintiff for certification, under Civ. R. 54(B), of the Court's Judgment Entry filed on December 19, 2006.

The Court finds that its Judgment Entry filed on December 29, 2006 was a final judgment as to fewer than all of the claims or parties. The Court finds defendants' motion well taken.

Therefore, it is hereby ORDERED that the December 19, 2006 entry is amended to reflect the determination by this Court that there is no just reason for delay.

January 4, 2007

/s/Jeffrey L. Reed
Jeffrey L Reed, Judge

IN THE COURT OF APPEALS OF THE THIRD
APPELLATE JUDICIAL DISTRICT OF OHIO
ALLEN COUNTY

BRUCE COMLY FRENCH,
TRUSTEE FOR THE BANKRUPTCY ESTATE OF
TONY L. AND SUSANNE M. BEMIS,

PLAINTIFF-APPELLANT. CASE NO. 1-07-08

v.

JOURNAL
CRAIG FOUST, ET AL., ENTRY

DEFENDANTS-APPELLEES.

This cause comes before the Court *sua sponte* for determination as to whether the appeal should be dismissed for lack of jurisdiction.

The judgment on appeal ruled upon a motion made by the Bankruptcy Trustee for Plaintiffs to determine their prior counsel's "potential claim" for fees under a fee agreement. The judgment orders only that prior counsel in entitled to a fee for services rendered based on the principle of *quantum meruit*. In so finding, the trial court makes clear that the order is based upon numerous assumptions, and nothing in the record reflects whether prior counsel even claims a fee or whether this personal injury case has been settled or otherwise reduced in judgment. Upon request of the Bankruptcy Trustee, the judgment was ordered to be

amended with a Civ.R. 54(B) certification of "no reason for delay," and the instant appeal followed.

An order which adjudicates one or more but fewer than all the claims or rights and liabilities of fewer than all parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable. *Noble v. Colwell* (1989), 44 Ohio St.3d 92.

In the instant case, the Court finds that the judgment on appeal does involve a proceeding ancillary to the personal injury action and, therefore, it qualifies as a grant of "provisional remedy." See R.C. 2505.02(B)(4). However, the judgment neither determines the provisional remedy nor has Appellant (Bankruptcy Trustee for Plaintiffs) been precluded from meaningful or effective remedy by appeal following final judgment. R.C. 2505.02(B)(4)(a) and (b).

The interlocutory and speculative nature of the trial court's judgment is apparent from the numerous assumptions upon which the decision is based. Moreover, the ancillary issue has not been determined to any degree of finality since the declaration to "entitlement" of fees makes no reference to an amount or percentage of total fees due. See, i.e., *In the* Matter of: Minor Settlement of Stine, Hancock App.No. 5-06-11, 2006-Ohio-6687. As such, the judgment is not a "final order," and including Civ.R. 54(B) language does not make appealable an otherwise non-appealable order. See *Noble v. Colwell* (1989), 44 Ohio St.3d 92; and *Douthitt v. Garrison* (1981), 3 Ohio App.3d 254.

Finally, it is not clear from a record so devoid of findings of fact, but we are compelled to question the standing and suitability of the Bankruptcy Trustee for Plaintiffs raising and litigating what amounts to dispute for

attorney fees between Plaintiffs' prior counsel and their current counsel. However, as the appeal is not properly before the Court, this question need not be addressed.

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the appeal be, and hereby is, **DISMISSED** at the costs of the appellant for which judgment is hereby rendered and that this cause be, and hereby is, remanded to the trial court for the execution of the judgment for costs.

/s/Richard M. Rogers
/s/Vernon L. Preston
JUDGES

DATED: February 12, 2007

The Supreme Court of Ohio

Bruce Comly French, Trustee for the Bankruptcy Esatate of Tony L. and Susanne M. Bemis

Case No. 2007-0485

ENTRY

v.

Craig Foust et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Allen County Court of Appeals: No. 10708)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

File stamped June 20, 2007

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	JUDGE RICHARD L. SPEER
Tony/Susanne Bemis	)	
	)	Case No. 06-3292
Debtor(s)	)	
	)	(Related Case: 05-75858)
Susanne Bemis, et al.	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Craig Foust	)	
	)	
Defendant(s)	)	

ORDER

For good cause shown, the Motion of the Defendant for Voluntary Abstention, pursuant 28 U.S.C. § 1334(c)(1), is well-taken. The state-court proceeding for which the Trustee sought removal, – *Susan* [sic] *Marie Bemis, et al v. Craig Foust, et al.*, Allen County Court of Common Pleas, Ohio, Case No. 05-CV-0325 – has significantly progressed so that "in the interest of comity" with the state court, abstention would best serve the "interest of justice." This Court's abstention in the state-court proceeding, however, shall in no way be construed as to effect or limit the estate's interest in the proceeding; nor shall it be construed to limit or waive any other aspects of bankruptcy law such as the Trustee's right to appear in and prosecute the state-court action.

IT IS SO ORDERED

Dated: July 20, 2006

/s/Richard L. Speer
Richard L. Speer
United States
Bankruptcy Judge